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Supreme Court, U.S.
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No. 94-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CARL DIXON,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

Whether certiorari should be denied because the facts of this case are so unique that they could not lead to any general rule of law.

Whether petitioner's claim is barred by independent and adequate state grounds when the Illinois Appellate Court found that petitioner failed to preserve his claim for review under the applicable state statute.

Whether petitioner got all he was entitled to under the Confrontation Clause when he was given two chances to cross-examine a witness, although he waived cross-examination both times.

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OPINION BELOW

The opinion in this matter of the Appellate Court of Illinois, First Judicial District, is reported as *People v. Dixon*, 256 Ill. App. 3d 771, 628 N.E. 2d 399 (1st Dist. 1993).

STATUTE INVOLVED

725 ILCS 5/115-10.1 provides in pertinent part:

> Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement . . . narrates, describes or explains an event or condition of which the witness had personal knowledge, and . . . the statement is proved to have been written or signed by the witness. . . .

STATEMENT OF THE CASE

Petitioner Carl Dixon was convicted at a bench trial in Chicago of the first degree murder of Patrick Marshall. The Appellate Court of Illinois affirmed, holding that petitioner had been given his constitutional right to confront witness Christopher Carlisle. *People v. Dixon*, 256 Ill. App. 3d 771, 628 N.E. 2d 399 (1st Dist. 1993). The Appellate Court said: "As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated." 256 Ill. App. 3d at 778, 628 N.E. 2d at 907.

Evidence at Trial

Alzola Breaux, sister of the victim's fiancee, testified that the victim Patrick Marshall was at home around 11:30 p.m. on May 11, 1990 when he said that he was going out with some friends for a couple of beers. (Record on Appeal or "R." A12) Ms. Breaux never saw Patrick Marshall alive again.

Officer Darryl Cavin was working the midnight shift on the south side of Chicago on May 12, 1990 when he re-

sponded to a call of a man shot. (R. A17) Officer Cavin found the body of Patrick Marshall lying face down on the street and saw Christopher Carlisle standing next to the body. (R. A18-A19)

Evidence Technician Joseph Moran testified that four discharged .25 caliber shells were found at the crime scene. (R. A29)

Ashadu McPherson testified that he had seen the victim steal a handgun from petitioner during the night of the murder and had seen petitioner with other guns trying to hunt down the victim. McPherson said that a couple of hours before the murder he had been part of a group of men who met in a schoolyard and that petitioner, the victim and Christopher Carlisle had been part of that group. (R. A34) The men passed around a 9 millimeter automatic and the victim Patrick Marshall broke and ran after taking that gun from petitioner. (R. A36) Petitioner tried to run after the victim, but gave up and went into his home and got a shotgun. (R. A37-A38) Then petitioner drove around the neighborhood with the shotgun trying to find the victim. (R. A39) A couple of hours later McPherson drove around the neighborhood again with petitioner, but at that time petitioner had a .25 caliber handgun. (R. A41) Petitioner said that if he didn't get his gun back he would have to do something to the victim. (R. A42-A43)

Charles Jemison testified that he had been with petitioner and McPherson when petitioner was driving around with his shotgun trying to find the victim. (R. A46-A48) Jemison had seen petitioner point the shotgun at another man and demand to be told where the victim was. (R. A49)

It was stipulated that a deputy medical examiner would testify that the victim Patrick Marshall died of three gunshot wounds to the back region. (R. B18-B20) The wounds were inflicted by .25 caliber bullets. (R. B20)

Christopher Carlisle was called to the stand by the State. This witness had given a written statement saying that he had seen petitioner shoot the victim. This was also the witness that petitioner's attorney twice refused to cross-examine. (R. A66, R. B22) Carlisle testified that he had been a friend of petitioner all his life. (R. A57) When asked if he was still a friend of petitioner Carlisle tried to plead the Fifth Amendment but the trial judge ordered him to answer. (R. A58) Carlisle then admitted that he was still petitioner's friend.

Carlisle then testified (without claiming any privilege) that he had been with the victim Patrick Marshall at the time and place of the murder. (R. A58) According to Carlisle a green car pulled up next to the victim, but Carlisle claimed that he did not know who owned the car and that it was too dark for him to see anyone get out of the car. (R. A59) When asked if he had seen petitioner get out of the car Carlisle again pleaded the Fifth Amendment, but again was ordered to answer by the trial judge. (R. A59) Carlisle then said that he did not see defendant get out of the car. (R. A60)

The prosecutor then asked a series of leading questions which together covered everything in Carlisle's written statement which had implicated defendant in the murder of Patrick Marshall. In each question the prosecutor quoted a sentence from the written statement and then asked Carlisle if that sentence was correct. In response to each leading question Carlisle denied that the information was true. (R. A60-A61) Specifically, Carlisle denied that he had seen petitioner walk up to the victim, say "where is my shit at" and then shoot the victim several times. (R. A60)

Then the prosecutor questioned Carlisle about the written statement and Carlisle admitted that he had given a statement to Assistant State's Attorney David Studenroth on the

morning of May 12, 1990 in the lobby of the police station on 103rd street. (R. A62-A63) However, when the prosecutor questioned Carlisle about what was in the statement Carlisle pleaded the Fifth Amendment yet again and this time the trial judge sustained that plea. Carlisle did deny that he had been threatened by defendant and denied that he was afraid of defendant. (R. A64) He also testified that nine months after the murder he had given a statement about the case to a court reporter at the office of petitioner's attorney. (R. A65-A66)

Defense counsel waived cross-examination at that point, but asked that the sheriff return Carlisle (who was in custody on an unrelated matter) to court the next day to testify as a possible rebuttal witness. (R. A67) The trial judge ordered that Carlisle be brought back to court. (R. A67)

Assistant State's Attorney David Studenroth testified about the written and signed statement he had taken from Christopher Carlisle which incriminated petitioner. Studenroth testified that Carlisle had not been a suspect in the murder case, but only a witness. Carlisle had told the assistant state's attorney that, at the time and place of the murder, Carlisle had seen petitioner get out of a car holding a gun in his hand. (R. B11) Petitioner said to the victim, "where's my shit at," and the victim said, "I'll get it to you man." (R. B12) Petitioner then pointed the gun at the victim and fired several times. (R. B12) The victim began to run, but collapsed after half a block. (R. B12)

Under the authority of an Illinois statute, the trial judge admitted as substantive evidence those portions of Christopher Carlisle's written statement which were inconsistent with Carlisle's testimony at trial. 725 ILCS 5/115-10.1. Petitioner's attorney declined to recall Carlisle to the witness stand and rested without presenting any evidence. (R. B22)

The trial judge found petitioner guilty of first degree murder and later sentenced petitioner to 20 years in custody. (R. B35, D5)

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE FACTS OF THIS CASE ARE SO UNIQUE THAT THEY WOULD NOT LEAD TO ANY GENERAL RULE OF LAW.

The facts of this case are so peculiar that they are not going to be duplicated in any other case. Moreover, any decision on the Confrontation Clause issue here would depend on the unique facts of this case and therefore any ruling by this Court in this matter would not lead to any general rule of law. U.S. Const., Amend. VI. Therefore certiorari should be denied, because the precious time and resources of this Court should not be wasted on a case of no general importance. U.S. Sup. Ct. Rule 10.1(c).

There are three unique things about this case which are not likely to all be found in any other criminal matter:

1. The witness who gave an out-of-court statement pleaded his right against self-incrimination to some but not all of the questions put to him by the State at trial, and there was no predictable pattern in when that witness pleaded the Fifth Amendment.
2. The trial judge upheld some of the attempts of that witness to plead the Fifth Amendment but overruled others, and those rulings by the judge were not predictable.
3. Defense counsel at trial did not try to cross-examine the witness either before or after the incriminating out-of-court statement was admitted into evidence.

Since all these unique facts would be central to any ruling by this Court on the Confrontation Clause issue, that ruling would not amount to any principle of law which could be generally applied in criminal cases.

It is settled law that when a witness refuses on grounds of self-incrimination to answer *any* questions put to him at trial, then the Confrontation Clause has not been satisfied and an out-of-court statement by that witness is ordinarily inadmissible. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). It is also settled law that when a defendant has the opportunity to cross-examine a witness, even when that opportunity is not as complete as the defense might wish, then an out-of-court statement by that witness can be admitted without violating the Confrontation Clause. *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 383, 98 L. Ed. 2d 951 (1987); *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Here, however, there is a strange variation on the two situations that is unlikely to be duplicated in any other case.

Here on direct examination Christopher Carlisle voluntarily answered some questions, was forced by the trial judge to answer others and successfully refused to answer a third group of questions. The defense did not even try to cross-examine the witness, so there is no way of telling what Carlisle would have said or refused to say if petitioner's attorney had tried to question him. Petitioner asks this Court to rule that there was no opportunity for effective cross-examination, but this Court could do so only by guessing at the hypothetical content of a cross-examination that never happened.

Therefore any ruling by this Court on the Confrontation Clause issue would depend on the unique facts of this case and would not be a particularly useful guide in other matters. This Court might rule that because Carlisle

answered some highly relevant questions, and because the defense did not even try to cross-examine him on any subject, then the Confrontation Clause was satisfied. On the other hand, this Court might rule that since Carlisle successfully refused to answer some questions then the Confrontation Clause was violated, even though the defense did not try to cross-examine him. Either ruling would depend on the unique pattern of direct examination in this case and on the unusual decision by the defense not to cross-examine. Therefore such a ruling would not lead to any general rule of law which could guide judges in others Confrontation Clause cases.

Accordingly this Court should deny certiorari because this case involves no ". . . important question of federal law which has not been, but should be, settled by this Court. . . ." U.S. Sup. Ct. Rule 10.1(c). The general principles of law which apply to Confrontation Clause issues have already been decided by this Court, and they would not be significantly clarified by any ruling on the unique facts of this case. A grant of certiorari is inappropriate when, because of the particular facts of the case, a decision by this Court would not establish a significant rule of law. *Duncan v. Tennessee*, 405 U.S. 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972); *Monks v. New Jersey*, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970).

In most cases a witness either will or will not invoke his right against self-incrimination when questioned about a crime. Here the witness pled the Fifth Amendment to some questions but not others. In most cases a judge either will or will not allow a witness to refuse to answer questions on grounds of possible self-incrimination. Here the trial judge allowed the witness to refuse to answer some questions, but ordered the witness to answer others. In most cases a defense lawyer will cross-examine a witness who gives im-

portant testimony about a crime, or at least the lawyer will not refuse to cross-examine and then claim that the Confrontation Clause was violated. Here, on the other hand, petitioner's trial attorney declined to cross-examine the witness, but petitioner claimed on appeal that his right to effective cross-examination had been denied. The facts of this case, insofar as they are relevant to the Confrontation Clause, are not likely to reoccur in any other case. Therefore this Court should deny certiorari since there is no question of general importance to be decided here.

II.

PETITIONER'S CONFRONTATION CLAUSE ISSUE IS BARRED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, BECAUSE THE APPELLATE COURT OF ILLINOIS FOUND THAT PETITIONER FAILED TO PRESERVE HIS CLAIM UNDER THE APPLICABLE STATE STATUTE.

Petitioner argues that he can raise his Confrontation Clause issue in this Court even though his trial lawyer twice refused to try to cross-examine the witness whose out-of-court statement was admitted into evidence. However, the steps necessary to preserve a claim for review in state court are not a matter of federal constitutional law, but rather a matter of state law. As the Appellate Court of Illinois found, under the Illinois statute governing admission of out-of-court statements it is necessary to try to cross-examine a witness before claiming on appeal that the witness was not available for cross-examination. 725 ILCS 5/115-10.1. Petitioner's failure to comply with the requirements of the statute is an independent and adequate ground for the decision of the Appellate Court of Illinois. Therefore petitioner has left this Court with nothing to review, since his Confrontation Clause issue is barred on independent and adequate state grounds.

"Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512, n. 7, 98 S. Ct. 1942, 1951 n. 7, 56 L. Ed. 2d 486, 500 n. 7 (1978). See also *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965). Illinois has a specific statute governing the conditions under which the out-of-court statement of a witness may be admitted into evidence after that witness testifies at a criminal trial. 725 ILCS 5/115-10.1. One of the conditions for admission of an out-of-court statement under the statute, as under the Confrontation Clause, is that the witness be subject to cross-examination. 725 ILCS 5/115-10.1(b). The Illinois reviewing court held that petitioner was barred from claiming on appeal that Christopher Carlisle was not available for cross-examination when defense counsel did not even try to cross-examine him.

In holding that petitioner's claim was barred under the statute, the Appellate Court of Illinois said:

> The second element of section 115-10.1 requires that the witness be available for cross-examination concerning his prior statement. This requirement was unequivocally satisfied. At the conclusion of Carlisle's direct examination testimony, the trial court inquired as to whether defense counsel wanted to cross-examine Carlisle. Defense counsel responded, "No cross, your Honor." Defense counsel, then, had the full opportunity to cross-examine Carlisle who was readily available. This is all section 115-10.1 mandates.
>
> Defendant argues that, because Carlisle invoked his fifth amendment privilege on direct examination, he would have been unavailable to testify on cross-examination. As previously elucidated, Carlisle did testify substantively at trial and defense counsel decided not

> to cross-examine him presumably because his testimony was favorable to defendant.
>
> This contention further assumes that Carlisle would have asserted his fifth amendment privilege when cross-examined by defense counsel. This, of course, is speculation. Defendant cannot claim a lack of opportunity to cross-examine Carlisle when he did not even attempt to call Carlisle to the stand. *People v. Dixon*, 256 Ill. App. 3d 771, 776-77, 628 N.E. 2d 399, 403-04 (1st Dist. 1993).

Thus the Illinois reviewing court held that under the statute petitioner, having not even attempted to cross-examine a witness who had given substantive testimony on direct, had failed to preserve for review the claim that the witness was not available for cross-examination.

Later in its opinion the Illinois reviewing court held that, having failed to preserve his claim under the statute governing admission of out-of-court statements by a witness, petitioner had also forfeited his related claim under the Confrontation Clause. That court said: "As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated." 256 Ill. App. 3d at 778, 628 N.E. 2d at 404. Thus the Illinois reviewing court held that petitioner, being barred under the statute from claiming that the witness was not available for cross-examination, was also barred on the same grounds from claiming that he was denied the right to confront that witness.

Although the facts of this case are unusual, the Illinois reviewing court simply applied established Illinois law in holding that petitioner had forfeited his Confrontation Clause issue by not even trying to cross-examine the witness. In fact there is a definitive decision of the Illinois Supreme Court holding that a defendant who does not try to cross-examine a witness waives any claim that he was denied his constitutional right to confrontation. *People v.*

Jones, 123 Ill. 2d 387, 528 N.E. 2d 648 (1988). In *Jones* the Illinois Supreme Court said:

> In this case, however, defense counsel made no attempt to question Mr. Dare, and we decline to speculate whether the witness would or would not have responded to cross-examination on those matters to which he testified on direct. Without more, we are unable to conclude here that the defendant was denied his right to confront the witness. 123 Ill. 2d at 407, 528 N.E. 2d at 657.

Thus the highest court of Illinois has held in a definitive ruling that a defendant who does not even try to cross-examine a witness has waived the constitutional claim that he was denied the right to confront that witness. Thus the Illinois Appellate Court in petitioner's case simply enforced an established state procedural rule in holding that petitioner failed to preserve his Confrontation Clause issue for appeal when he refused to cross-examine the witness.[1]

The steps necessary to preserve an issue for appellate review are a matter of state law, not federal constitutional law. When a defendant has failed to preserve a claim for

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[1] The Illinois courts have recognized, however, that when a witness refuses to answer *all* questions then the witness is not available for cross-examination and an out-of-court statement by that witness is not admissible under the Illinois statute. *People v. Redd*, 135 Ill. 2d 252, 553 N.E. 2d 316 (1990). Thus in a case in which a witness refused to answer any further questions and asked to be sent to jail for contempt, it was held that the witness was not available for cross-examination even though the defense did not attempt to question the witness. *People v. Yarbrough*, 166 Ill. App. 3d 825, 520 N.E. 2d 116 (5th Dist. 1988). *Redd* and *Yarbrough* are consistent on their facts and their logic with the ruling of the Appellate Court of Illinois in petitioner's case. Here Christopher Carlisle never refused to answer any question when ordered to do so and here Carlisle had given important substantive testimony on direct examination. Therefore the only way to find out if Carlisle was available for cross-examination would have been to try to cross-examine him.

review in accordance with state law, then review by this Court is barred provided the state has a legitimate interest in enforcing its rule. "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 772, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640, 655 (1991). The procedure necessary to preserve petitioner's Confrontation Clause issue for appellate review is and ought to be a question of Illinois law.

Illinois has a legitimate interest in requiring a defendant to try to cross-examine a witness before claiming on appeal that the defense was denied effective cross-examination. Only if defense counsel attempts to cross-examine a witness will the reviewing court know what questions the defense wished to ask and whether the witness was willing to answer them. If the defense refuses to even try to cross-examine then the Confrontation Clause issue is abstract, since the reviewing court will have no way of knowing what cross-examination would have been attempted. But when defense counsel tries to cross-examine the witness then the issue on appeal is concrete, since the reviewing court will know what questions the witness answered or refused to answer. Certainly a state has a legitimate interest in seeing that concrete and specific issues are presented to its reviewing courts for decision. Only then can important questions, such a harmless error, be decided in a realistic fashion. Therefore the Illinois rule on Confrontation Clause issues is based on a legitimate state interest and is binding on federal review.

Petitioner has attempted without discussion to turn a question of state appellate procedure into one of federal constitutional law. His petition argues that a defendant

should not have to go through the allegedly futile act of attempting to cross-examine a witness who has refused on Fifth Amendment grounds to answer some of the questions on direct examination. (Pet. 13-19) Whatever one thinks of petitioner's argument, it deals with a policy question on criminal procedure rather than any issue under the Sixth Amendment. The Confrontation Clause guarantees the right to reasonably effective cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). It says nothing about how an issue under that clause should be preserved for review in state court. Here petitioner failed to preserve his constitutional claim under a reasonable rule of Illinois law, so review by this Court is barred.

It should be noted that on the facts of this case Illinois has a particularly strong interest in enforcing its rule. The witness in question, Christopher Carlisle, voluntarily answered some important questions on direct examination and answered other important questions after he was ordered to do so. He successfully pled his privilege against self-incrimination only to a limited number of questions. Therefore defense counsel should have attempted to cross-examine Carlisle, as Illinois law requires in order to preserve the Confrontation Clause issue for review. It is entirely possible that Carlisle was willing to answer or would have been ordered to answer the questions, if any, that defense counsel wanted to ask.

Illinois law requires a defendant, before asserting on appeal that he was denied the right to effective cross-examination, to actually attempt to cross-examine the witness. That is a reasonable state rule supported by a legitimate state interest. It provides an independent and adequate state ground for the reviewing court decision in this case, so petitioner has no legal basis for requesting review by this Court.

III.

SINCE PETITIONER HAD TWO SEPARATE OPPORTUNITIES TO CROSS-EXAMINE THE WITNESS AND REFUSED TO DO SO BOTH TIMES, PETITIONER WAS GIVEN HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Petitioner asks this Court to speculate about the content of a cross examination which never took place. He claims he was denied his rights under the Confrontation Clause, but he twice refused to cross-examine the witness when he had a chance to do so. Since petitioner was given chances to cross-examine Christopher Carlisle, he was given his constitutional right to confront that witness. As for petitioner's argument that he was denied the right of effective cross-examination, that is pure speculation which is not supported by the record. The record shows that the witness would have answered at least some questions about the murder, but petitioner deprived this Court of any chance to know if the witness would have answered whatever questions defense counsel might have asked on cross-examination. Since petitioner was given the chance to cross-examine but refused to do so, he was given everything that the Confrontation Clause requires.

As noted, on direct examination by the State Christopher Carlisle voluntarily answered some questions, was ordered by the trial judge to answer other questions and successfully pled his right against self-incrimination as to a third group of questions. After Carlisle testified, petitioner's attorney said, "No cross, your Honor." (R. A66) However, petitioner's attorney asked that Carlisle, who was in custody on an unrelated matter, be returned by the sheriff to the court the next day for possible testimony. Petitioner's attorney said:

> [PETITIONER'S ATTORNEY]: Your Honor, may I ask that the writ of habeas corpus [*ad testificandum*] that was issued for Mr. Carlisle issue for tomorrow, in case I need him as a rebuttal witness?
>
> THE COURT: Sure. Writ is continued. (R. A67)

Thus petitioner's trial attorney certainly did not think that Carlisle was unavailable for examination by the defense, since petitioner's attorney asked that Carlisle be returned to court so that the defense would have a chance to recall him. However, the next day defense counsel rested at trial without recalling Carlisle. (R. B22)

Petitioner asserts without justification that the witness Christopher Carlisle certainly would have refused to answer questions if defense counsel had tried to cross-examine him. That assertion is just not supported by the record. On direct examination Carlisle did answer some questions voluntarily and was ordered by the trial judge to answer others. Moreover, the record suggests that Carlisle did not really fear self-incrimination but was actually refusing to cooperate with the prosecution because he wanted to help petitioner get an acquittal. Therefore the record shows that it is entirely possible that Carlisle would have answered whatever questions defense counsel might have put to him at trial. Since petitioner had a chance to cross-examine the witness at trial, and since the record shows that the witness might have answered petitioner's hypothetical questions, petitioner was given his Sixth Amendment right to confront witnesses.

On direct examination by the State the witness Christopher Carlisle voluntarily testified that he had been present at the scene of the murder at the time the victim was killed, and had seen the car used by the murderer drive up to the victim. (R. A58) Carlisle also voluntarily testified that for all his life he had been a friend of petitioner. (R.

A58) In addition, Carlisle testified that he remembered giving a statement to an assistant state's attorney at a police station. (R. A61) Also, Carlisle voluntarily testified that before trial he had gone to the office of petitioner's attorney and had given a statement to a court reporter about the case. (R. A65-A66)

Carlisle attempted to plead his right against self-incrimination as to what he saw at the time of the murder, but the trial judge ruled that such testimony would not be incriminating to Carlisle and ordered Carlisle to answer. (R. A59-A60) Then Carlisle testified about what he had seen at the time of the murder, denying that he had seen petitioner shoot and kill the victim. (R. A59-A61)

Thus Christopher Carlisle gave at least some testimony about every aspect of this case. He testified about what he had seen at the time of the murder, about his relationship with petitioner, and about his written statements given to the prosecution and the defense. He successfully pled the Fifth Amendment only about the content of his written statement to the assistant state's attorney. (R. A63-A64) There is no way of telling from the record what defense counsel might have asked on cross-examination or whether Carlisle would have answered those questions.

The only thing that is certain from the record is that petitioner's attorney twice refused to cross-examine the witness. There is nothing in the record to show that defense counsel wanted to ask any questions of Christopher Carlisle, that Carlisle would have refused to answer those unknown questions or that the trial judge would have allowed Carlisle to refuse to do so. Petitioner's argument, that he did not have a chance to effectively cross-examine the witness, is based on nothing but unsupported speculation. Since petitioner was given two chances to cross-examine the witness, but refused to do so, petitioner was given his rights under the Confrontation Clause.

Indeed, the record suggests that the witness Christopher Carlisle was trying to help petitioner and might have been entirely cooperative if questioned by defense counsel. After all, petitioner and Carlisle were lifelong friends. (R. A58) In addition, Carlisle was in custody on an unrelated matter and may have feared cooperating with the prosecution against a fellow inmate. (R. A67) Also, Carlisle had gone to the office of petitioner's attorney and repudiated the written statement he had given to the assistant state's attorney. (R. A4-A5, A65-A66) The point is that on the facts of this case the only way to find out if Carlisle would have answered questions on cross-examination would have been to ask those questions.[2]

The Confrontation Clause guarantees an adequate opportunity to cross-examine an adverse witness, but does not guarantee cross-examination which is effective in whatever way and to whatever extent that the defendant might wish. *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988); *Delaware v. Fensterer*, 474 U.S. 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). More importantly, if cross-examination has been restricted as a result of a defendant's own actions, then there is no violation of the Con-

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[2] Indeed, the trial judge implicitly found that Carlisle had no reasonable grounds to fear self-incrimination with respect to the murder, but was merely pleading the Fifth Amendment in order to avoid testifying against petitioner. See *In re Zisook*, 88 Ill. 2d 321, 430 N.E. 2d 1037 (1981). The trial judge ordered Carlisle to testify as to what he had seen at the time and place of the murder, even though Carlisle had tried to plead his right against self-incrimination. (R. A58-A59) But the trial judge sustained Carlisle's Fifth Amendment plea to questions about his written statement, presumably to protect Carlisle from incriminating himself on a perjury charge for false testimony at trial favoring petitioner. (R. A63-A64) In any event, the correctness of the trial judge's rulings on Carlisle's Fifth Amendment rights is not at issue in this matter.

frontation Clause. *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991); *Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). Here petitioner's trial attorney twice refused to cross-examine Christopher Carlisle when given the opportunity, so the only restriction on cross-examination shown by the record was the result of petitioner's own choice.

In the *Owens* and *Fensterer* cases this Court held that the Confrontation Clause may be satisfied even if a State's witness cannot be cross-examined by the defense on some important aspects of his testimony. In *Owens* a witness, because of severe brain damage, had no recollection at the time of trial of the attack which injured him. *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). In *Fensterer* an expert witness testified about his findings, but could not remember how he had reached those conclusions. In each case this Court held that the defendant had been given his constitutional right to confront those witnesses, even though the witnesses were effectively unavailable for cross-examination on important subjects. Similarly, petitioner here was given his right to confront Christopher Carlisle, although Carlisle had refused to answer questions on one subject on direct examination and might (or might not) have refused to answer some questions on cross-examination.

But it is more important that the record does not show what, if any, restrictions were imposed on petitioner's cross-examination because petitioner's trial attorney did not attempt to cross-examine the witness. In the *Lucas* and *Stubbs* cases this Court held that when apparent restrictions on cross-examination were the result of defense counsel's own actions, then there is no violation of the Confrontation Clause. In *Lucas* a defendant charged with rape was unable to cross-examine the victim about her past

sexual relations with that defendant because defense counsel had failed to move for a hearing under a rape shield statute. *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991). This Court held that since the defendant's own attorney was responsible for the restriction on cross-examination, there was no violation of the Confrontation Clause. In *Stubbs* the defendant's attorney at a previous trial, either through lack of preparation or through trial strategy, avoided a certain line of cross-examination of a key witness. *Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). This Court held when the witness was unavailable at a second trial a transcript of his testimony could be admitted, although defense counsel at the second trial wanted to ask the questions the defense avoided at the first trial. Thus when a restriction on cross-examination is the result of the actions of defense counsel, then there is no violation of the Confrontation Clause.

Here petitioner's trial attorney twice refused to try to cross-examine Christopher Carlisle. As a result we do not know what questions might have been asked on cross-examination or whether Carlisle would have answered them. The only person who restricted cross-examination of the witness was petitioner's own attorney, so there has been no violation of the Confrontation Clause.

Petitioner relies heavily on the *Douglas* decision of this Court, but that was a case where there could be no cross-examination because there was no testimony of substance on direct examination. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). In *Douglas* the State called a witness who refused on grounds of self-incrimination to answer any questions other than to give his name and address. This Court held that an out-of-court statement by the witness was inadmissible. Here, on the other hand, Christopher Carlisle voluntarily answered a

number of important questions on direct examination and was ordered by the trial judge to answer others. Realistically, there is just no way of knowing what questions he might have been asked on cross-examination or whether he would have answered them. Thus the situation in *Douglas*, where there was absolutely nothing to cross-examine on and the witness refused to answer every question, is certainly not present here. In *Douglas* there was no testimony by the witness and no possibility that any questions would have been answered on cross-examination. In petitioner's case there was important testimony by the witness on direct examination and it was certain that the witness would have answered at least some question on cross. Thus *Douglas* is just not on point here, since the facts surrounding any opportunity to cross-examine were completely different than they were at petitioner's trial.

Petitioner also relies on the *Lee* decision, in which this Court specifically refused to address the question of whether a co-defendant was available for cross-examination after the co-defendant's out-of-court statement was admitted into evidence against the defendant. *Lee v. Illinois*, 476 U.S. 530, 539, 106 S. Ct. 2056, 2061, 90 L. Ed. 2d 514, 525 (1986). Thus *Lee* has nothing to do with this case, particularly as Christopher Carlisle was not a co-defendant, did take the stand and did give important testimony on direct examination.

Petitioner simply asserts that his attorney refused to try to cross-examine Christopher Carlisle because that attorney thought that any attempt at cross-examination would be futile. (Pet. 5, 7) The record does not support that assertion. The common-sense explanation of defense counsel's refusal to cross-examine is that he was afraid, not that Carlisle would refuse to testify, but that Carlisle would testify on cross and hurt the defense. As the trial judge found,

Carlisle had seen petitioner shoot the victim to death. Nevertheless, on direct examination Carlisle denied that he had seen any such thing. (R. A58-A61) The record suggests that petitioner's attorney thought that the defense had done as well as it could with Christopher Carlisle, and that cross-examination could only hurt the defense.

In other words, for understandable reasons petitioner's trial attorney twice refused to cross-examine a witness. Petitioner is bound by that decision, so he has no claim under the Confrontation Clause.

Ethics

Petitioner makes the strange suggestion that it would have been unethical for his trial attorney to try to cross-examine Christopher Carlisle. (Pet. 20-21) However, since Carlisle had given some important testimony on direct, cross-examination of him would have been entirely proper. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). This is particularly true as it was unclear to what extent Carlisle would plead the privilege against self-incrimination on cross-examination and to what extent the trial judge would sustain that plea.

Petitioner relies on an American Bar Association Standard providing that defense counsel shall not call a witness in the presence of a jury when the lawyer knows that the witness will claim a valid privilege not to testify. ABA Standards Relating to the Administration of Criminal Justice; Defense Function Standard 4-7.6. That is not a rule of law applying to Illinois trials and, even if it were, by its own terms it would not have applied at petitioner's trial. This was a bench trial, so there was no jury to be prejudiced or misled if Carlisle had pled the Fifth Amendment on cross-examination. Petitioner also cites cases saying a defendant has no right to call a witness who is certain to refuse to

testify on grounds of self-incrimination. However, Christopher Carlisle was not called by petitioner but by the State, and had given important testimony on direct examination.

Alleged Conflict of Authority

Petitioner falsely claims that there is a conflict of authority on whether a defendant must attempt to question a witness before claiming on appeal that the witness was not available to testify. (Pet. 17-19) In fact the cases cited by petitioner follow a reasonably consistent rule of law and if the results of those cases vary it is because the facts of the cases also vary.

Petitioner cites certain cases holding that a witness was unavailable to testify and that thus an out-of-court statement was admissible under some rule of evidence. *United States v. Flores*, 985 F. 2d 770 (5th Cir. 1993); *United States v. Harrell*, 788 F. 2d 1524 (11th Cir. 1986); *United States v. Adams,* 759 F. 2d 1099 (3d Cir. 1985); *United States v. Brainard*, 690 F. 2d 1117 (4th Cir. 1982); *United States v. Thomas*, 571 F. 2d 285 (5th Cir. 1978); *State v. Hansen*, 312 S.W. 2d 96 (Minn. 1981); *State v. Smith*, 415 A. 2d 553 (Maine 1980). But in those cases the declarant was either a co-defendant at the same trial or had specifically refused in person or through counsel to testify to anything, so the facts of the case showed that the declarant was unavailable.

On the other hand, petitioner cites certain cases in which a declaration against penal interest was held to be inadmissible because the declarant was not shown to be unavailable to testify. *United States v. Salerno*, 868 F. 2d 524 (2d Cir. 1989); *United States v. Pelton*, 578 F. 2d 701 (8th Cir. 1978); *United States v. Oropeza*, 564 F. 2d 316 (9th Cir. 1977); *People v. Rosenthal*, 670 P. 2d 1254 (Colo. Ct. App. 1983). However, in none of those cases was the declarant a co-defendant at the same trial and in none of those cases

did the declarant actually claim the privilege against self-incrimination. Therefore the reviewing courts ruled on the facts that the witness was not shown to be unavailable. Accordingly, there is no conflict between the two groups of cases cited by petitioner, since in all such cases availability of a witness was determined according to the particular facts in the record.

Also, most of the lower court precedents cited by petitioner do not rely on the Confrontation Clause to decide the case. The decision in most of those cases is based on a state or federal rule of evidence rather than any constitutional provision. Therefore not only do the cases cited by petitioner fail to show a conflict of authority, most are not even relevant to this matter. They have nothing to do with petitioner's claim that the Confrontation Clause imposes a uniform procedural rule on all criminal cases in all state and federal courts.

Summary

Petitioner claims that he was denied the right to confront a witness against him although petitioner's attorney twice refused to try to cross-examine that witness. Petitioner's whole argument for a grant of certiorari is based on his assertion that it was "beyond question" that Christopher Carlisle would refuse to testify on cross-examination (Pet. 20) That assertion is false and because it is false there is no reason for this Court to review this case. On direct examination Carlisle answered some questions voluntarily and was ordered by the trial judge to answer others. Carlisle successfully pled the Fifth Amendment only as to questions on a single subject, but the record suggests that he did so to protect petitioner rather than because he actually feared self-incrimination. What Carlisle, defense counsel and the trial judge might have done on cross-examination is any-

body's guess. However, it is certain that the facts of this case are unique to the point that review by this Court would not lead to any general rule of law. A defendant who refuses to even try to cross-examine a witness should not claim on appellate review that he was denied any right under the Confrontation Clause. Accordingly, this Court should deny certiorari.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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